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No. 88-1099

IN THE SUPREME COURT
of the
UNITED STATES

October Term, 1988

BV Engineering,
Petitioner,
vs.
University of California, Los Angeles
(The Regents of the
University of California)
Respondent.

MOTION AND BRIEF OF AMICUS CURIAE CENTER FOR PROTECTION OF CREATIVE RIGHTS IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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INTERESTS OF AMICUS CURIAE

The Center for the Protection of Creative Rights is an organization recently formed for the purpose of providing information on the scope and intended protections of creative works under the copyright laws and to address the rights and interests of copyright holders, particularly in the areas of computer software, publishing, and film production. Activities of the Center will include conferences, studies of pertinent issues in copyright law, and assistance to the courts through the filing of briefs as an amicus curiae on questions of first impression or of national importance.

Due to the importance of the decision of the United States Court of Appeals for the Ninth Circuit in affirming the District Court Order granting summary judgment and barring the action of Petitioner, BV Engineering, for damages arising from the University of California, Los Angeles' infringement of Petitioner's copyright, the Center seeks leave to appear as an amicus curiae in support of the Petition for a Writ of Certiorari and to file a further brief addressing the merits if the Petition is granted.

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The Center for the Protection of Creative Rights respectfully requests leave to appear as an amicus curiae in support of the Petition for a Writ of Certiorari filed on behalf of BV Engineering for review of the judgment of the United States Court of Appeals for the Ninth Circuit entered on October 3, 1988, in a matter titled BV Engineering v. University of California, Los Angeles, 858 F.2d 1394 (9th Cir. 1988).

MOTION FOR LEAVE TO APPEAR AS AN AMICUS CURIAE

The Center for the Protection of Creative Rights was formed to address significant issues of copyright law and protection, particularly as they serve (and were intended to insulate and advance) the emergence of new ideas and technologies in the computer, publishing, film, and comparable industries. The Media Institute, based in Washington, D.C., and The Freedom of Expression Foundation, centered at California State University, Long Beach, are the two co-sponsors of this organization.

Specifically, The Media Institute is recognized as one of this country's pre-imminent non-profit "think tanks" on issues affecting the communications industry. The Institute receives support from a wide variety of corporations and other foundations, pursuing a wide range of activities in the area of communications policy. The Freedom of Expression Foundation has, for several years, been equally well recognized as a preeminent independent foundation in the evaluation, advancement, and discussion of First Amendment issues. The Foundation is guided by advisory boards on research and policy issues comprised of leaders in the communications industry and looks to the First Amendment as a major consideration in evaluating the nature legislative or judicial limitations on expression.

While both organizations draw support from private industry, the co-sponsors of the Center, and the Center in its own right, are dedicated to the advancement of issues designed to serve the nation as a whole. The Center seeks to provide information and to address controverted interpretations of the vital protections afforded by the copyright laws, even where the positions advanced are not entirely supported by certain financial supporters.

Independently, the Center for the Protection of Creative Rights, although jointly sponsored by The Media Institute and The Freedom of Expression Foundation, will have its own Advisory Council drawn from the publishing, computer, and entertainment industries. The Center seeks to offer comment, guidance, and discussions of the serious policy implications of changes (or the lack of change) in the copyright laws. However, the Center has no interest in a "winner" or a "loser" on a particular issue, but seeks to inform and address the original basis and continued need for the protection of original creative works consistent with the copyright laws and the first amendment of the United States Constitution.

In the matter of BV Engineering v. University of California, Los Angeles, the Center seeks leave of Court to appear as an amicus curiae for the purpose of initially supporting the Petition for a

Writ of Certiorari and, if the Petition is granted, addressing the legal merits and policy implications of the judgment of the United States Court of Appeals for the Ninth Circuit. The Center has requested the consent of BV Engineering, the Petitioner, and the University of California, Los Angeles, the Respondent, for participation as an amicus curiae. Counsel for BV Engineering has consented to the Center appearing as an amicus curiae. However, counsel for the University of California, Los Angeles, has declined to consent, necessitating the formal presentation of a motion to this Court pursuant to Rule 36.1.

The Center respectfully requests leave to participate as an amicus curiae at the Petition stage and later if this case is accepted for oral argument. In seeking leave to participate as an amicus curiae, the Center intends to draw upon the resources of its independent Advisory Council and co-sponsoring organizations to provide guidance on the copyright law implications of the decision of the Ninth Circuit. Moreover, the Center has connections with academic instructions and will be able to provide a unique perspective on the serious implications of the Ninth Circuit's decision that copyright law protections do not extend to the state and university environment.

The Center is able to offer an objective discussion of the copyright law and constitutional protections at issue, both generally and as they specifically pertain to the cooperative relationship

between private industry or creative individuals and the academic world. The very organizational purpose of the Center is consistent with participation as an amicus curiae in a case having obvious nationwide effect on the protection of creative works from infringement and unauthorized redistribution.

As the case is presently before the Court on a Petition for a Writ of Certiorari, the Center has submitted a brief statement of argument in support of the merits of review in order to avoid duplication. However, the Center has issues to address separate and distinct from the legal questions framed in the Petition, including the serious societal implications of the holding of the Ninth Circuit on continued cooperation between private industry and academia in the sharing of information and works. While the Center has the resources and expertise to inform on the legal issues framed in the Petition, it is also the intent of the amicus curiae to discuss the policy implications of the decision.

SUMMARY OF ARGUMENT OF AMICUS CURIAE IN SUPPORT OF PETITION

The United States Constitution specifically recognizes the power of Congress to secure to authors and inventors exclusive rights to their creative works. U.S.Const. Art. I § 8, cl. 8. Subsequent legislation and case precedent have confirmed the importance that original creative work receive the intended protection from unauthorized

use, thereby maximizing the incentive to create and to later share the new without fear of infringement.

The decision of the United States Court of Appeals for the Ninth Circuit in BV Engineering v. University of California, Los Angeles, holding that states and related institutions are insulated by the eleventh amendment from honoring the protections of copyright law, runs afoul of very interests sought to be protected by the Constitution, subsequent laws, and interpretive court decisions. The declared ability of state institutions, specifically colleges and universities, to reproduce books, articles, computer files, educational films, or any manner of data without regard to the rights and interests of their creators not only violates the underlying intent of the copyright laws, but threatens to sever the relationship between private industry or creative individuals and academic institutions in the sharing of information and the maximization of learning opportunities for students and faculty alike.

ARGUMENT OF AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

In advancing a request for participation in this case as an amicus curiae, the Center does not wish to duplicate the legal and policy arguments advanced by BV Engineering in its Petition. The Center concurs with the positions offered as to the importance of copyright protections and applicability to the states and related institutions

despite the eleventh amendment. The Center, in support of the Petition for a Writ of Certiorari, wishes to emphasize several controlling points demonstrating the imperative need for further review by this Court.

The fact of copyright infringement, specifically the unauthorized initial use and later duplication of BV Engineering's original works by the University of California, is not really in dispute. Instead, the Ninth Circuit determined that the protections afforded by the express language of the Copyright Act of 1976 did not extend to the states and related institutions due to the absence of "unequivocal and specific language" indicating a Congressional intent to abrogate a general eleventh amendment immunity, relying on Atascadero State Hospital v. Scanlon, 473 U.S. 234 (1985) and Welch v. Texas Department of Highways and Transportation, 107 S.Ct. 2941 (1987). (858 F.2d at 1397.)

This determination is clearly at odds with the framework of legislatively created protections of copyrighted works. Initially, the decision reflects an unwarranted requirement for the presence of a few more words in the Copyright Act in order to make abrogation even clear, elevating form over the substance of the Act. At the same time, there is no question as to the authority of Congress to abrogate the immunity through legislation under the Copyright and Patent Clause of Article 1 of the Constitution. Congress can abrogate any eleventh amendment immunity, which the record reflects was accomplished by the Copyright Act.

The Ninth Circuit's decision is inconsistent with an earlier ruling in Mills Music, Inc. v. Arizona, 591 F.2d 1278 (9th Cir. 1979), which expressly concluded that the abrogation of any purported eleventh amendment immunity of the states is necessarily a part of the Copyright and Patent Clause of the Constitution and the provisions of the Copyright Act of 1976. 591 F.2d at 1286. As recognized in Mills Music, the express Congressional intention that exclusive rights in original and creative works be protected would be rendered illusory if the user-intensive states and related institutions were free to copy and redistribute the works. Id. Despite the statutory construction precedents of Atascadero and Welch, the underlying analysis in Mills Music continues to find support in subsequent judicial decisions, [see, e.g., Johnson v. University of Virginia, 606 F.Supp. 321, 323-24 (W.D. Va. 1985)] and from recognized scholars in the area of copyright law. [See, e.g., 3 M. Mimmer and D. Nimmer Nimmer on Copyright § 12.01[E], at 12-21 (1986); Note, The Applicability of the Eleventh Amendment Immunity Under the Copyright Acts of 1909 and 1976, 36 Am. U.L. Rev. 163, 183 (1986).

In addition, the legitimacy of the construction of the federal copyright laws as abrogating any residual eleventh amendment immunity is supported by the states' practical construction of these statutes. Several Attorneys General have been reported as advising state agencies of their being subject to liability under the federal copyright statutes. [See Petition, pg. 10 n.5.] The Register of

Copyrights has also noted the states' implicit recognition of the enforceable rights of copyright holders through the states' payment of royalties for use of copyrighted works. 52 Fed. Reg. 42,045 (November 2, 1987). While not controlling, the practical construction which the states have placed on the scope and applicability of the copyright laws must be persuasive, and at a minimum establishes a legitimate basis for review and clarification in this area. No less persuasive, and no less compelling, is the finding of the Copyright Office that "Congress intended to hold states responsible under the Federal Copyright Law." See Register of Copyrights, Copyright Liability of States and the Eleventh Amendment (June, 1988). This Court customarily defers to the views of the Copyright Office in regard to the interpretation of the Copyright Act. DeSylvia v. Ballantine, 351 U.S. 570, 577-78 (1956).

Congress has specifically provided that federal courts have exclusive jurisdiction over controversies involving allegations of infringement of protected works. 28 U.S.C. §1338(a). To reinforce the exclusivity and intended availability of a federal forum, state laws which were the functional equivalent of the protection of exclusive rights in copyrighted works are preempted by the Copyright Act. 17 U.S.C. § 301(a). This legislative formulation renders a finding of eleventh amendment immunity based on a stringent test for Congressional abrogation antithetical to the intended protection against infringements by

anyone, necessarily including states and all institutions claiming protection under the mantel of state authority, distinguishing this case from the factual circumstances present in Atascadero, 473 U.S. at 240 n.2, and Welch, 107 S.Ct. at 2953 n.19.

The strict scrutiny test for legislative abrogation of the eleventh amendment immunity addressed in Atascadero and Welch, even if properly applied in light of the exclusive federal jurisdiction envisioned as part of the legislatively created protections, is still satisfied in the area of copyright law. Initially, Section 501 of the Copyright Act of 1976 is most instructive in light of its lack of specificity, as a cause of action for infringement exists against "[a]nyone who violates the exclusive rights of the copyright owner." 17 U.S.C. §501(a). The existence of a federal cause of action looks not to the identity of the infringer, but rather to the fact of the infringement. It is the latter which Congress deemed sufficient to create a federal right of action.

Secondly, to the extent one wishes to engage in the construction of the copyright statutes as a whole, the fact that the Copyright Act of 1976 offers prohibitions which are cast as not being applicable to the states when they undertake specified (and authorized) activities must mean that the same entities are otherwise within the scope of the original prohibitions. See, e.g., 17 U.S.C. §§110(2), (6) and (8), 111(a), (4), 112(b), (c) and (d), 118(d)(3), 601(b)(3), and 602(a)(1). The

legislative history and formulation of federal copyright protections inherently includes the states and their related agencies as falling within the unlimited category of third parties who may misappropriate protected works and face liability for copyright infringement.

As recited at length in the Petition, subsequent judicial interpretation of Atascadero has resulted in a number of lower courts dismissing copyright damages actions against states and related institutions on the basis of an eleventh amendment immunity. [Petition, pg. 6, n.2.] The societal consequence of the Ninth Circuit's decision can best be appreciated by recognizing the importance ascribed to the advancement of creativity and innovation through the protections afforded by the copyright statutes, and the inadequacy of alternative remedies to assure that the protections are realized.

The first aspect is not reasonably capable of dispute, as the promotional orientation of the protections afforded are implicit in the broad Constitutional grant of legislative authority in this area. Seemingly no more amenable to dispute is the failure of injunctive relief to afford an effective remedy for abuse, as injunctions merely forestall future violations, United States v. Oregon State Medical Society, 343 U.S. 326, 333 (1952), and were in fact expressly recognized by the Ninth Circuit in this case as being sufficiently imperfect as to permit "states to violate the Federal copyright laws with virtual impunity." (858 F.2d at 1400.)

However, the issue before this Court is not limited to statutory interpretation as there are very real adverse consequences which flow from the states' claimed immunity from the protection of the federal copyright laws. Initially, the unwarranted adverse impact on owners of copyrights cannot even be questioned. Individuals and companies which commit time and resources to the formulation of original creative works are deserving of protection. The appropriation of their work without permission and compensation, and particularly where the appropriation is followed by unauthorized duplication and distribution to others, carries serious financial consequences to the originators and constitutes a deterrent to continued creativity.

The impact on states and related agencies also cannot be ignored. If the originators of creative works cannot be assured of protection from unauthorized copying and redistribution, the maintenance of a market for the original work will result in the products being unavailable to public institutions. Moreover, the propensity of private think tanks and creative organizations to associate with academic institutions and share a common source of people and ideas will be subject to retrenchment if private industry cannot be assured of proprietary rights over works which they fund, develop. If the decision in BV Engineering stands, every individual or organization who associates with a state institution will be required to reevaluate continued association, and whether the benefits which flow to the

private and public parties is worth the risk that exclusive rights in any resulting works will be sacrificed.

In comparison, the interests sought to be advanced by the eleventh amendment are not jeopardized by holding states liable for copyright infringement. The balance of power between state and federal courts is unaffected as exclusive jurisdiction over copyright actions is already vested in the federal courts. 28 U.S.C. §1338(a). There can be no threat of federal encroachment of authority over copyright protections, as comparable laws are statutorily preempted. 17 U.S.C. §301(a). Moreover, there will be no new or enormous financial burdens imposed on the states or their agencies, Hutto v. Finney, 437 U.S. 678, 807 (1978), as the states are not required to use protected works and should therefore be subject to damages when they voluntarily engage in actions constituting an infringement.

When one considers the adverse consequences flowing from a finding that the eleventh amendment immunizes the states and their agencies from liability for copyright infringement, it is readily apparent that the interests of both the copyright owners and the states institutions are served by this Court accepting review of the Ninth Circuit's decision in this matter.

CONCLUSION

For the foregoing reasons, the Center for the Protection of Creative Rights should be granted leave to appear as an amicus curiae, to submit a brief in support of the Petition for a Writ of Certiorari, and to thereafter submit a further brief in advance of oral argument.

Respectfully submitted,

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF ORANGE

I am employed in the County of Orange, State of California. I am over the age of (18) and not a party to the within action. My business address is 1912 North Broadway, Santa Ana, California 92706.

On February 4, 1989, I served the foregoing documents, described as **MOTION AND BRIEF OF AMICUS CURIAE, CENTER FOR THE PROTECTION OF CREATIVE RIGHTS, IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE NINTH CIRCUIT COURT OF APPEALS** and **APPEARANCE FORM** on the following parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

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I caused such envelope with postage thereon fully prepaid to be placed in the United States mail at Santa Ana, California.

Executed on February 4, 1989, at Santa Ana, California. I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

ROBERT J. FELDHAKE